Supreme Court, U.S.
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No. 09- OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

THOMAS M. BEAVER, M.D.;
SIGURD J. NORMANN, M.D.; DIANA CARDONA, M.D.;
and THE UNIVERSITY OF FLORIDA BOARD OF TRUSTEES,

Petitioners,

v.

PATRICIA DANNEMANN,

Respondent.

On Petition for a Writ of Certiorari to the Florida First District Court of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state law on healthcare privacy limit a physician's constitutional right to counsel?

LIST OF PARTIES

All parties to the proceeding in the court whose judgment is the subject of this petition are listed in the caption of the case on the cover page.

The named defendant in the trial court, Shands Teaching Hospital and Clinics, Inc., did not participate in state court appellate review and is not participating here.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the Petition (Pet. App. 1a), and is reported at *Dannemann v. Shands Teaching Hospital and Clinics, Inc.*, 14 So. 3d 246 (Fla. 1st Dist. Ct. App.), *rev. denied*, 19 So. 3d 987 (Fla. 2009).

JURISDICTION

The date on which the highest state court decided this case on the merits was May 11, 2009. (Pet. App. 1a) The Florida Supreme Court denied discretionary review of this case on September 24, 2009. *University of Florida Board of Trustees v. Dannemann*, 19 So. 3d 987 (Fla. 2009) (table) (Pet. App. 17a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the free speech clause of the First Amendment to the United States Constitution, and the due process clause of the Fourteenth Amendment; and specifically their guarantee of the right to legal counsel. Amend. I, U.S. Const. ("Congress shall make no law ... abridging the freedom of speech ... ."); Amend. XIV § 1, U.S. Const. ("No state shall ... deprive any person of life, liberty, or property, without due process of law ... .").

In addition, the case involves the Florida patient-privacy statute, section 456.057(8), Florida Statutes (2007), which provides as follows:

> (8) Except in a medical negligence action or administrative proceeding when a health care practitioner or provider is or reasonably expects to be named as a defendant, information disclosed to a health care practitioner by a patient in the course of the care and treatment of such patient is confidential and may be disclosed only to other health care practitioners and providers involved in the care or treatment of the patient, or if permitted by written authorization from the patient or compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given.

STATEMENT OF THE CASE

This case pits a state statutory right of privacy in healthcare information, against the constitutional right to counsel and to engage in free speech within the attorney-client relationship. The Florida First District Court of Appeal interpreted Florida's patient-privacy statute, section 456.057(8), Florida Statutes (2007), as an absolute prohibition on Petitioners' communicating with their own legal counsel about Respondent's decedent's medical information. The Florida court prohibited such attorney-client communication despite the fact that Respondent filed suit for her late husband's wrongful death and sought to depose the individual physician-Petitioners as non-party fact witnesses about decedent's medical information. These physicians are employed by the University of Florida Board of Trustees (UFBOT), and participated in creating the very medical records at issue in Respondent's lawsuit, in the course of their employment with UFBOT. (Pet. App. 9a)

When Respondent sought to depose these physicians, Petitioners asserted that they had the right to communicate freely with their legal counsel, specifically including the right to communicate with counsel about decedent's medical information relevant to the lawsuit and these physicians' impending depositions. (Pet. App. 7a) Respondent moved the trial court for a protective order prohibiting the Petitioners from communicating her late husband's medical information to legal counsel

prior to the physicians' depositions, relying on the literal language of the Florida patient-privacy statute. (*Id.*) Petitioners sought a court order authorizing unhindered communication with their legal counsel, asserting, among other things, that the Florida statute could not be applied to deprive them of their right to counsel under Florida law and the First and Fourteenth Amendments to the United States Constitution. (Pet. App. 10a-12a)

The trial court rendered an order granting the UFBOT-employed physician witnesses the right to communicate freely with their legal counsel, specifically including decedent's medical information. (Pet. App. 5a) The trial court expressly acknowledged that the UFBOT physicians have constitutional guarantees of free speech, privacy, and the right to confer with counsel, which deserve protection, concluding that there was no "compelling State interest to warrant such a restraint and infringement on privacy [as between attorney and client]":

> With respect to Plaintiff's contention that the proposed physician deponents be prohibited from talking to their attorney with respect to anticipated areas of inquiry, a very important question is raised. What legitimate state interest exists within the context of this case to prevent such a discussion? The question arises because of the constitutional guarantees of freedom of speech, privacy, and the right to confer with

counsel regarding one's legal rights and the protection of one's property interests that may be affected by participating in this judicial proceeding as a witness. In this case, we not only deal with a deceased person's medical information, the protection of which, being based on notions of personal privacy, is not as critical a concern as if the patient were still alive, but also medical information that is already the subject of a public forum. Additionally, the subject medical information at issue is already completely known to the Plaintiff (and her attorney) in this action, by the proposed physician deponents, and by the named Defendant (and its attorney). Therefore, in the context of this case, the parties and the proposed deponents all have knowledge of the medical information at issue, and the public has a right of access to it as it becomes part of the court record, but the Plaintiff nonetheless argues that § 456.057 prevents the proposed physician deponents from talking about this information with their own attorney prior to their depositions being taken. To interpret § 456.057 in such a manner as to prohibit witnesses from conferring with counsel under such circumstances would render the statute unconstitutional due to the absence of any compelling state interest to warrant such a restraint and infringement on privacy. All of the proposed deponents have rights to speech, privacy, and to confer with

> counsel regarding their legal rights. With respect to the physician witness who participated in caring for the deceased, there are rights to due process in the protection of additional legal interests, such as protection from exposure to a *Fabre [v. Marin*, 623 So. 2d 1182 (Fla. 1993)] attack, if for no other reason, for the sake of maintaining professional reputation, and the risk of being reported to national and state data banks and credentialing committees, all of which can impact a physician's livelihood.

(Pet. App. 10a-11a) The trial court refrained from declaring the state statute unconstitutional as applied, instead deciding that the physicians' right to communicate freely with their counsel was adequately established on state-law grounds; but noting that if the state-law grounds were inadequate, unconstitutionality was an alternative basis for the ruling. (Pet. App. 11a-13a)

Respondent petitioned the Florida First District Court of Appeal for a writ of certiorari, which the Florida court granted. (Pet. App. 1a) In its opinion, the Florida court adhered to an earlier decision in which it had interpreted the Florida statute narrowly -- and without reference to the federal constitutional issues -- as allowing the communication of patient healthcare information *only* in the four instances expressly enumerated in the statute. (Pet. App. 2a) On this reasoning, the Florida court interpreted the Florida statute as

precluding physicians and their employers from communicating freely with legal counsel about patients' medical information, unless one of the four enumerated patient-privacy exceptions applied:

> This court held in *Hannon [v. Roper,* 945 So.2d 534 (Fla. 1st DCA 2006), *rev. denied*, 967 So.2d 198 (Fla. 2007)], that the clear, unambiguous language of the patient confidentiality statute, section 456.057(6), Florida Statutes (2006), presently numbered as subsection (8), prohibits any nonparty physician from disclosing the decedent's medical condition and history to the counsel hired by the defendant's insurer to represent the physician at a deposition. We explained that there are only four circumstances that would allow a health care practitioner or provider to discuss a patient's medical condition and treatment, *Hannon,* 945 So.2d at 536, and none of those circumstances are present in this case.

Dannemann, 14 So. 3d at 247-48 (Pet. App. 2a-3a)

Before the Florida appellate court, Petitioners again asserted their First-Amendment and Fourteenth-Amendment rights to have legal counsel and to communicate freely with counsel, but the Florida court expressly rejected those arguments:

> Respondents [Petitioners here] raise the same constitutional issues that were raised in *Hannon*. Specifically, respondents contend that our application of section 456.057 in *Hannon* violates the physicians' constitutional right to counsel protected by the free speech clause of the First Amendment and their rights under the due process clause of the Fourteenth Amendment. Amend. I, U.S. Const.; Amend. XIV § 1, U.S. Const. Respondents urge us to address these issues, arguing that they were unresolved in *Hannon*. Certainly, "no decision is authority on any question not raised and considered ... ." *State ex rel. Helseth v. Du Bose*, 99 Fla. 812, 128 So. 4, 6 (1930). Even though this court in *Hannon* did not discuss the constitutional issues raised there, the court's silence supports the necessary conclusion that those issues were considered and rejected. In *Hannon*, the court granted relief based upon section 456.057(6), which it could not have done had it been persuaded the statute was constitutionally infirm.

Dannemann, 14 So. 3d at 248 (Pet. App. 3a-4a). The Florida appellate court conducted no balancing test such as that the trial court had employed. (*See id.*) Petitioners timely sought discretionary review in the Florida Supreme Court, which was denied. (Pet. App. 17a)

REASONS FOR GRANTING THE PETITION

The Court should grant the Petition because the Florida court's decision impermissibly restricts the constitutional right to counsel, and is particularly susceptible to broad abuse in the hotbed context of healthcare privacy. The Florida court's error was its failure to recognize that no state statute may restrict a right guaranteed by the United States Constitution; that is, that federal constitutional rights, including the right to counsel, are implicit exceptions to, or limits on, the Florida patient-privacy statute, as on all state statutes. The decision merits this Court's review not only because the decision is wrong; but because it is wrong about an important and fundamental constitutional right, and the Florida court's reasoning jeopardizes the constitutional rights of every healthcare provider, and every employer of healthcare providers, nationwide.

A. The Florida Court's Ruling Violates Petitioners' First and Fourteenth Amendment Rights.

Petitioners enjoy the right to counsel, and the right to communicate freely with that counsel, under the United States Constitution. The right to counsel in civil cases is "no less fundamental" than the Sixth-Amendment right to counsel in criminal cases. *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255,

1262 (5th Cir. 1983).[1] Counsel denied is due process denied:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Powell v. Alabama, 287 U.S. 45, 69 (1932). The right to counsel in civil cases "inheres in the very notion of an adversarial system of justice, and is indispensable to the effective protection of individual rights." *Mosley v. St. Louis Southwestern Railway*, 634 F.2d 942, 945 (5th Cir.), *cert. denied*, 452 U.S. 906 (1981).

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[1] The First, Fifth, Seventh, Eleventh, and District of Columbia Circuits all have held that there is a constitutional right to counsel in civil cases or administrative proceedings. In addition to the cases cited in the text, *see In Re: BellSouth Corp.*, 334 F.3d 941, 961 (11th Cir. 2003) ("Because a party is presumptively entitled to the counsel of his choice, that right may be overridden only if 'compelling reasons' exist."); *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 257 (1st Cir. 1986) ("a civil litigant does have a constitutional right, deriving from due process, to retain hired counsel in a civil case").

The right to counsel in civil cases arises out of First Amendment rights. *Denius v. Dunlap*, 209 F.3d 944 (7th Cir. 2000). In *Denius*, the Seventh Circuit stated that "[t]he right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech, association and petition" and "prohibits the state from interfering with collective action by individuals to seek legal rights and retain legal counsel." *Id.* at 953-54. The right to counsel in civil matters extends to any legal matter, and is not simply limited to formal representation in hearings or court proceedings. "[T]he state cannot impede an individual's ability to consult with counsel on legal matters" and "the First Amendment protects the right of an individual or group to consult with an attorney on *any* legal matter." *Id.* at 954 (emphasis added). A lawyer deprived of the very information as to which legal advice is sought is no lawyer at all, because the essence of the attorney-client relationship is full and frank communication. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

The Fourteenth-Amendment underpinnings of the right to counsel in civil cases are set forth in *Potaschnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980). The trial court in *Potaschnick* had prohibited defense counsel from conferring with his client during breaks and recesses in the client's testimony. 609 F.2d at 1117. The Fifth Circuit noted that a civil litigant's right to counsel was "rooted" in "notions of due

process" and that in civil matters, just as much in criminal cases, a litigant requires the "guiding hands of counsel in every step of the proceeding against him." *Id.* at 1118. The right to counsel is of "constitutional dimensions and should thus be freely exercised without impingement." *Id.* The Fifth Circuit reversed the trial court's order because it violated the defendant's due process right to counsel. *Id.* at 1119.

A particularly instructive case emphasizing the constitutional right to unfettered attorney-client communications is *Martin v. Lauer*, 686 F. 2d 24 (D.C. Cir. 1982). In *Martin*, two government employees consulted an attorney to discuss bringing a lawsuit challenging a workforce reduction by their employing agency. The agency asserted that the employees had no right to convey to their attorney any information that would be confidential and exempt from disclosure under the Freedom of Information Act, and issued an order demanding that the two employees disclose all such information they had given their lawyer. The agency then obtained from the district court an injunction enforcing the order. 686 F. 2d at 31.

Although the district court order in *Martin* prevented the two government employees from disclosing to their attorney information "confidential" under the Freedom of Information Act, the District of Columbia Circuit Court quashed that order. The Circuit Court held that the employees had "an undeniable right to retain counsel to

ascertain their legal rights" and an interest in "speaking freely with their attorneys," *id.* at 32; and rejected the imposition of such restrictions on attorney-client communications:

> Restrictions on speech between attorneys and their clients directly undermine the ability of attorneys to offer sound legal advice. As the common law has long recognized, the right to confer with counsel would be hollow if those consulting counsel could not speak freely about their legal problems.

Id. The *Martin* court also acknowledged the employees' "legitimate interest in an early assessment of their legal rights" and held that both the employees' "speech interest" and "fundamental right of access to the courts" deserve "rigorous protection." *Id.* at 33.

Under these authorities, the UFBOT physician-witnesses have a constitutional right to consult with their legal counsel *and* to communicate freely with counsel.[2] For the attorney-client

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[2] The law likewise demands that witnesses, whether or not parties to litigation, have the benefit of legal representation during a deposition. *E.g., Women in City Government United v. City of New York*, 112 F.R.D. 29, 32 (S.D. N.Y. 1986) ("[a] person being deposed, whether a party or a non-party witness, is

relationship to be meaningful, it must encompass unfettered communication, even to the extent of conveying otherwise private patient health care information to counsel. *See Upjohn*, 449 U.S. at 389. The Florida court erred in failing to acknowledge and protect that constitutional right.

The Florida court likewise erred in failing to analyze the relative weight of the competing claims to healthcare privacy and right to counsel, although the trial court had performed the requisite evaluation and determined that the right to counsel must prevail. Where, as here, there is a constitutional right to counsel in a civil matter, a state may not impinge upon that right without a compelling reason. *Texas Catastrophe Prop. Ins.*

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entitled to have counsel present at his deposition."). The right to counsel during a deposition is so strong that a witness may appropriately refuse to testify if his lawyer is excluded from the deposition. *Peters v. Goodyear Tire & Rubber Co.*, 76 N.E. 2d 412, 416-17 (Ohio 1947) ("Constitutional or legal privileges given to the people of a sovereign state are such as bestow upon those people the inherent or implied right to employ such legal representation as assures them the preservation of those privileges."). Here, the Respondent's position was that the physicians could have their lawyer present at their depositions, but could not communicate freely with counsel prior to those depositions. To be meaningful, the right to counsel *during* a deposition must extend to pre-deposition consultation.

Assoc. v. Morales, 975 F. 2d 1178, 1181 (5th Cir. 1992), *cert. denied*, 507 U.S. 1018 (1993). Any state statute that burdens First-Amendment rights must serve a compelling governmental interest and must be as narrowly tailored as possible. *See, e.g., Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

The trial court correctly concluded that the Florida patient-privacy statute creates no compelling reason to justify any infringement on physicians' right to counsel. (Pet. App. 11a) The factual context illustrates the marked weakness in the privacy claim, involving as it does publicly-filed litigation placing the decedent's medical information squarely at issue, pre-suit exchanges of information and subsequent discovery involving exactly that same information, the fact that the physician-witnesses at issue actually participated in developing the decedent's medical information in the course of their employment with UFBOT, and the fact that the subject matter of the physician-witnesses' requested depositions would necessarily involve decedent's medical information. (Pet. App. 9a-11a) Compared to the physicians' constitutional right to the benefit of legal counsel, and the concomitant right to communicate freely with that counsel upon being called to testify in depositions about the decedent's medical care, the claim of privacy under the Florida statute becomes insignificant.

The conclusion that no compelling state interest justifies the restriction of physicians'

constitutional right to counsel is bolstered by the existence of valid laws and regulations recognizing that even "private" medical information is subject to disclosure for legitimate reasons, particularly when the context of its disclosure is itself protected by independent guarantees of confidentiality. The right to privacy in healthcare information, though the subject of significant regulation and litigation in recent years, did not exist at common law, and since its inception has always been limited to allow for legitimate disclosures of that information in appropriate contexts. *See, e.g., Whalen v. Roe*, 429 U.S. 589, 602 & n.29 (1977) ("disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient") (also noting the propriety of other state recordkeeping and reporting requirements). In the attorney-client context, no less than in these regulatory contexts, the disclosure of healthcare information is both legitimate and protected from further disclosure, and this truth weighs heavily in favor of concluding that physicians must be permitted to communicate patient medical information to their own legal counsel in the context of an attorney-client relationship.

The limits on the right to healthcare privacy are "largely unresolved." *Citizens for Health v. Leavitt*, 428 F.3d 167, 177 & n.10 (3d Cir. 2005), *cert. denied*, 549 U.S. 941 (2006). Nevertheless,

disclosures of healthcare information are constitutionally permissible in a wide variety of contexts, *none* of which rises to the higher level of the constitutionally-protected right to counsel at issue here. Once undertaken, the balancing test must produce the conclusion that Florida's state statutory right to healthcare privacy cannot supersede the Federal constitutional right to counsel.

The Florida appellate court's holding to the contrary, summarily concluding that the Florida statutory right to privacy in healthcare information outweighs the constitutional right to counsel, violates both the First-Amendment right to free speech and association, and the Fourteenth-Amendment due process clause. *Denius*, 209 F. 3d at 953-54; *Texas Catastrophe*, 975 F. 2d at 1181. As applied by the Florida appellate court, the Florida patient-privacy statute impermissibly burdens physicians' rights of association and speech with legal counsel, employers, and management personnel. This Court should grant the Petition, vacate the Florida court's decision, and remand this case so that the Florida court's improper infringement on physicians' constitutional right to counsel may be rectified.

B. The Florida Court's Ruling Was Not Supported By Florida Precedent.

This Court should grant the Petition for the additional purpose of forestalling future reliance on an incorrect interpretation of Florida Supreme Court precedent. The Florida intermediate appellate court stated that it was constrained by Florida Supreme Court precedent to reject Petitioners' First-Amendment claims:

> Further, we note that in *Acosta [v. Richter*, 671 So.2d 149 (Fla. 1996)], the [Florida] Supreme Court rejected the argument that the limitations on disclosure in section 455.241(2), Florida Statutes (1993) [the predecessor to current section 456.057(8)], are "somehow violative of a defendant physician's First Amendment rights to free speech." *Acosta*, 671 So.2d at 156.

Dannemann, 14 So. 3d at 248 (Pet. App. 4a).

Acosta, however, involved a materially different First-Amendment speech issue, not the First-Amendment right-to-counsel issue involved here. In *Acosta*, a medical negligence action named two physicians as defendants. 671 So. 2d at 150. The plaintiff was being treated by *other* physicians. The lawyer representing the two defendant physicians sought to communicate *ex parte* with the plaintiff's non-party treating physicians. *Id. Acosta*

nowhere states or even implies the existence of any attorney-client relationship between the treating physicians and the lawyer who wanted to talk with them about the plaintiff's medical condition. This fact renders *Acosta* materially distinguishable from this case, involving a direct attorney-client relationship between the physician-witnesses and their legal counsel.

The Florida court failed to appreciate this material factual distinction between *Acosta*, which did *not* involve a physician's communications with his *own* lawyer, and this case, which does. Correctly analyzed in light of its particular facts, *Acosta* neither requires nor supports the result the Florida court reached here. This error merits this Court's correction to keep other courts from following suit in other patient-privacy cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 17, 2009

APPENDIX

APPENDIX A

DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

Patricia DANNEMANN, Petitioner,
v.
SHANDS TEACHING HOSPITAL AND CLINICS, INC.; Thomas M. Beaver, M.D.; Sigurd J. Normann, M.D.; Diana Cardona, M.D.; and University of Florida Board of Trustees, Respondents.
No. 1D08-3923
[14 So.3d 246, 34 Fla. L. Weekly D945]

May 11, 2009

On Motion for Rehearing and Clarification

VAN NORTWICK, J.

Upon consideration of the Motion for Rehearing and Clarification, our opinion of March 13, 2009, is withdrawn and the following substituted therefor.

Patricia Dannemann, the plaintiff in a suit which alleges that employees of Shands Teaching Hospital and Clinics, Inc. (Shands) negligently caused the death of her husband, seeks certiorari review of an order denying her motion to prohibit pre-deposition conferences between nonparty physicians, Dr.

Beaver, Dr. Normann, and Dr. Cardona, employed by the University of Florida Board of Trustees (UFBOT), also a nonparty, and the counsel hired by the University of Florida Self Insurance Program (SIP), to represent these physicians at their depositions. SIP insures and defends both Shands and the University. The order would allow the physician witnesses to discuss the decedent's medical condition. Because this case is controlled by our previous decision in *Hannon v. Roper*, 945 So.2d 534 (Fla. 1st DCA 2006), and the Florida Supreme Court's decision in *Acosta v. Richter*, 671 So.2d 149 (Fla.1996), we grant the petition and quash the trial court's order.

Hannon also involved a suit against Shands for alleged medical malpractice causing the death of Hannon's son. This court held in *Hannon* that the clear, unambiguous language of the patient confidentiality statute, section 456.057(6), Florida Statutes (2005), presently numbered as subsection (8), prohibits any nonparty physician from disclosing the decedent's medical condition and history to the counsel hired by the defendant's insurer to represent the physician at a deposition. We explained that there are only four circumstances that would allow a health care practitioner or provider to discuss a patient's medical condition and treatment, *Hannon*, 945 So.2d at 536, and none of those circumstances are present in this case. The legislature created the physician-patient privilege by statute "where none existed before, and [provided] an explicit but limited

scheme for the disclosure of personal medical information." *Acosta,* 671 So.2d at 154. Though respondents believe the statute is ill-conceived, that is a matter for the legislature to address.

Respondents raise the same constitutional issues that were raised in *Hannon.* Specifically, respondents contend that our application of section 456.057 in *Hannon* violates the physicians' constitutional right to counsel protected by the free speech clause of the First Amendment and their rights under the due process clause of the Fourteenth Amendment. Amend. I, U.S. Const.; Amend. XIV § 1, U.S. Const. Respondents urge us to address these issues, arguing that they were unresolved in *Hannon.* Certainly, "no decision is authority on any question not raised and considered...." *State ex rel. Helseth v. Du Bose,* 99 Fla. 812, 128 So. 4, 6 (1930). Even though this court in *Hannon* did not discuss the constitutional issues raised there, the court's silence supports the necessary conclusion that those issues were considered and rejected. In *Hannon,* the court granted relief based upon section 456.057(6), which it could not have done had it been persuaded the statute was constitutionally infirm. We are bound by *Hannon* under the doctrine of *stare decisis. N. Fla. Women's Health and Counseling Servs., Inc. v. State,* 866 So.2d 612, 637 (Fla.2003) ("The doctrine of *stare decisis,* or the obligation of the court to abide by its own precedent, is grounded on the need for stability in the law and has been a fundamental tenet of

Anglo-American jurisprudence for centuries."). Further, we note that in *Acosta* the Supreme Court rejected the argument that the limitations on disclosure in section 455.241(2), Florida Statutes (1993), are "somehow violative of a defendant physician's First Amendment rights to free speech." *Acosta*, 671 So.2d at 156.

The petition for writ of certiorari is GRANTED and the trial court's order is QUASHED.

PADOVANO, AND CLARK, JJ., concur.

APPENDIX B

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT IN AND FOR ALACHUA COUNTY, FLORIDA

PATRICIA DANNEMANN,
As Personal Representative
Of the Estate of STEPHEN
DANNEMANN,

Plaintiff,

v.

CASE NUMBER:
01-2007-CA-3643
DIVISION: K

SHANDS TEACHING
HOSPITAL AND CLINICS,
INC.,

Defendants.
_____/

ORDER DENYING PLAINTIFF'S MOTION TO PROHIBIT PRE-DEPOSITION CONFERENCES AND GRANTING NON-PARTY WITNESSES' MOTION FOR LEAVE TO CONSULT WITH COUNSEL

THIS CAUSE came before the Court for hearing on cross motions for protective orders filed on behalf of three non-party witnesses and on behalf of the Plaintiff. The witnesses are physicians, and the issue at hand involves whether these physicians may, prior to their depositions being taken, discuss with their attorney matters pertaining to the medical condition, care and treatment of a deceased patient. Plaintiff's attempt to schedule the depositions of these physician witnesses gave rise to these competing motions.

This is an action for medical negligence filed by Patricia Dannemann, as personal representative of the Estate of Stephen Dannemann, deceased. The action has been filed solely against Shands Teaching Hospital and Clinics, Inc., for alleged negligence of said Defendant's employees while the deceased was a patient at Shands from April 5, 2005 through May 8, 2005. During his hospitalization, Mr. Dannemann had a left ventricular assist device surgically implanted. A cannula attached to tubing from this device was allegedly pulled from the patient's left ventricle while he was being turned by Shands' health care personnel. Mr. Dannemann died on May 8, 2005, and Plaintiff alleges that his death was the result of this episode.

Defendant Shands has answered the complaint by denying the alleged negligence and by asserting certain affirmative defenses. Among Defendant's affirmative defenses is one typically

referred to as a *Fabre* [*v. Marin*, 623 So. 2d 1182 (Fla. 1993)] defense under § 768.81 [Florida Statutes (2007)]. Shands has conditionally identified "the physicians who cared for Plaintiff's decedent during the timeframe described in the complaint" as individuals who caused part or all of Plaintiff's damages. This description would include one of the three physician witnesses. The remaining two physician witnesses participated in the deceased's postmortem examination.

Plaintiff's motion for protective order relies heavily upon *Hannon v. Roper*, 945 So. 2d 534 (Fla. 1st DCA 2006) in seeking an order preventing various physicians employed by the University of Florida, among whom are the three physician witnesses, from communicating with any person, including any attorney hired for them by the University's self-insurance program, regarding the medical care, history, condition, treatment, prognosis or diagnosis of the deceased, Stephen Dannemann. The breadth of Plaintiff's requested relief would prevent the proposed deponents from having any pre-deposition conferences with their attorney concerning the anticipated subject matter of their testimony. Plaintiff argues that the provisions of § 456.057 prevent such communication and that none of the statutory exceptions apply.

Counsel for the three physician witnesses seeks a protective order granting them leave to consult with counsel in connection with their

pending discovery depositions to include discussions with their attorney about the decedent's medical information.

Initially, the Court questions whether making a motion for protective order under [Florida Rule of Civil Procedure] Rule 1.280 is the appropriate procedure for raising the issues brought before the Court. Neither party has challenged the methodology employed and it appears that the same device was employed and unchallenged in the *Hannon v. Roper* case. Certainly the physician witnesses are persons "from whom discovery is sought," as referred to in the rule, and a protective order would be available to prevent "annoyance, embarrassment, oppression, or undue burden or expense." Perhaps one could argue that attempting to take someone's deposition without giving them the opportunity to consult with counsel is a form of "oppression," giving that term a liberal interpretation. However, with respect to the Plaintiff's motion for protective order, it hardly seems to fit within any category set forth in Rule 1.280(c) no matter how liberally it may be construed. In any event, despite the rule under which the motions are brought, they do clearly appear to seek relief from the Court that is within a trial court's jurisdiction to grant since they pertain to the conduct of this litigation. *Brand v. Old Republic Nat. Title Ins. Co.*, 797 So. 2d 643, 645 (Fla. 3d DCA 2001) (recognizing trial court's inherent authority to control conduct of litigation).

As set forth above, this action concerns and is founded upon the medical condition, care and treatment of a deceased patient. Pleadings, written discovery, depositions, expert opinions, exhibits, witnesses, and jury trial will all focus upon, discuss, present and analyze the decedent's medical history. The records of this lawsuit, including deposition transcripts, constitute "court records" to which the public has access. Fla. R. Jud. Admin. 2.420(b). All court proceedings, and the eventual jury trial, are open to the public. The medical records and postmortem examination records concerning this deceased patient, insofar as the events underlying this action are concerned, were generated and are maintained by Defendant Shands, who by virtue of being the custodian of these records, possesses full knowledge of what they contain. These records were, by virtue of statutory pre-suit requirements, obtained by Plaintiff before suit was filed, and have also been the subject of discovery requests by the Plaintiff herein, giving Plaintiff full knowledge of what they contain. The physicians whom the Plaintiff seeks to depose will be required by subpoena to talk about the decedent's medical information at their depositions, and, because of their personal involvement in either the care or examination of the deceased and their previous access to the medical records, already have full knowledge concerning the decedent's medical information. Undoubtedly, these witnesses will refer to the medical records during their testimony to

refresh their recollection. The circumstance presents itself, then, whereby a deceased patient's medical information is the primary subject of a proceeding in a public forum wherein literally all the relevant participants (including the parties' attorneys) already possess full knowledge of the subject medical information and as to which the public has free access, but whereby the personal representative seeks to use the deceased's medical records privilege to prevent physician witnesses from speaking with their own counsel concerning their anticipated testimony at deposition.

With respect to Plaintiff's contention that the proposed physician deponents be prohibited from talking to their attorney with respect to anticipated areas of inquiry, a very important question is raised. What legitimate state interest exists within the context of this case to prevent such a discussion? The question arises because of constitutional guarantees of freedom of speech, privacy, and the right to confer with counsel regarding one's legal rights and the protection of one's property interests that may be affected by participating in this judicial proceeding as a witness. In this case, we not only deal with a deceased person's medical information, the protection of which, being based on notions of personal privacy, is not as critical a concern as if the patient were still alive, but also medical information that is already the subject of a public forum. Additionally, the subject medical information at issue is already completely known to the Plaintiff

(and her attorney) in this action, by the proposed physician deponents, and by the named Defendant (and its attorney). Therefore, in the context of this case, the parties and the proposed deponents all have knowledge of the medical information at issue, and the public has a right of access to it as it becomes part of the court record, but the Plaintiff nonetheless argues that § 456.057 prevents the proposed physician deponents from talking about this information with their own attorney prior to their depositions being taken. To interpret § 456.057 in such a manner as to prohibit witnesses from conferring with counsel under such circumstances would render the statute unconstitutional due to the absence of any compelling state interest to warrant such a restraint and infringement on privacy. All of the proposed deponents have rights to speech, privacy, and to confer with counsel regarding their legal rights. With respect to the physician witness who participated in caring for the deceased, there are rights to due process in the protection of additional legal interests, such as protection from exposure to a *Fabre* attack, if for no other reason, for the sake of maintaining professional reputation, and the risk of being reported to national and state data banks and credentialing committees, all of which can impact a physician's livelihood.

Notwithstanding the above constitutional implications, resolution of the matters before the Court do not necessarily require findings of unconstitutionality because the Court's

interpretation of this statute simply does not forbid the proposed physician deponents from having pre-deposition conferences with their attorney concerning all matters incidental to their involvement in and knowledge about the deceased's medical history. The essence of the subject statute is to prevent "disclosure." Communication of medical information by these witnesses within the scope of an attorney-client relationship would not constitute "disclosure" because it is confidential and privileged. Fla. Stat. 90.502; *See, e.g., XL Specialty Ins. Co. v. Aircraft Holdings,* 929 So. 2d 578, 585 (Fla. 1st DCA 2006) (even statutory provisions creating bad faith actions against insurance companies do not abrogate attorney-client privilege as to insurer's knowledge of and reaction to advice of counsel). Moreover, by voluntarily filing this lawsuit concerning the deceased's medical care and by seeking the physician witnesses' testimony in this litigation, the Plaintiff has waived any applicable confidentiality under § 456.057 as to the witnesses' consultation with counsel, particularly because the Plaintiff has voluntarily initiated an event likely to result in a witness seeking assistance of counsel. *Id.* at 586 (privilege may be waived by voluntary disclosure); § 90.508 (person having privilege as to disclosure of confidential matters waives privilege when matter is voluntarily disclosed); *Major League Baseball v. Morsani,* 790 So. 2d 1071, 1077 fn 12 (Fla. 2001) (conduct which implies voluntary and intentional relinquishment of right amounts to waiver of right); *Hill v. Ray Carter Auto Sales, Inc.*, 745 So. 2d 1136,

1138 (Fla. 1st DCA 1999) (conduct inconsistent with right results in waiver of right).

WHEREFORE, the Court finds, adjudges and orders as follows:

1. Under the circumstances set forth in this case, pre-deposition conferences by the three physician witnesses with their attorney do not constitute "disclosure" of medical information in violation of § 456.057.

2. By calling upon the three physician witnesses to testify in this public proceeding which the Plaintiff has initiated, the Plaintiff has waived any applicable privilege of confidentiality under § 456.057 regarding pre-deposition consultations with counsel by said witnesses.

3. Alternatively, if the witnesses' consultation with counsel amount to "disclosure," and the Plaintiff, by calling said witnesses to testify, has not waived the statutory privilege with respect to pre-deposition consultations with counsel, then, as applied to the circumstances of this case, § 456.057 would be unconstitutional insofar as it would prohibit these witnesses from talking about the deceased's medical information with counsel during pre-deposition conferences, because there is no legitimate or compelling state interest to warrant such a restriction on speech and on the right to seek

legal advice, nor to warrant such an infringement on the witnesses' privacy.

Before concluding, the Court notes two additional matters. First, the only issue ripe for consideration and resolution herein is whether the three physician witnesses (Doctors Beaver, Normann and Cardona) may discuss the deceased's medical information with counsel during pre-deposition conferences. Plaintiff's motion for protective order is addressed to "any other physicians employed by the University of Florida" who participated in the deceased's care and treatment, and requests that they be prevented from communicating with "any person." Other than the three physician witnesses who have sought their own protective order, no circumstances have been demonstrated giving rise to any justiciable controversy as to any other physicians employed by the University of Florida. Additionally, only Doctors Beaver, Normann and Cardona have been given due notice and an opportunity to be heard, and the scope of their involvement only pertains to conversations during pre-deposition conferences. The parties agree that the three physician witnesses are entitled to representation and consultation with their attorney during the depositions. Thus, the resolution of these matters by the Court only focuses on the anticipated pre-deposition conferences between these three physician witnesses and their counsel.

Secondly, although the parties have presented argument as to the applicability of *Hannon v. Roper* and on the issue of whether or not the three physician witnesses might fall within the "expected defendant" exception to 457.057, this Court does not perceive that the *Hannon v. Roper* opinion is controlling in this matter and does not base its decision on whether or not these three physician witnesses could ever be named as defendants in this action. The *Hannon* decision only involved the statutory exception applicable to a health care provider who is or expects to be a named defendant in a medical negligence action. The *Hannon* decision found that exception to be inapplicable under the circumstances of that case. The decision reached by this Court in this case is based upon the absence of any disclosure under the circumstances presented and a waiver of the privilege, and, alternatively, the statute's unconstitutionality as applied to the circumstances of this case, none of which were addressed by the *Hannon* decision.

Accordingly, it is hereby

ORDERED AND ADJUDGED that Plaintiff's motion for protective order is DENIED insofar as it seeks to prevent Doctors Beaver, Normann and Cardona from discussing the deceased's medical information with counsel during pre-deposition conferences; and the motion of Doctors Beaver, Normann and Cardona for leave to consult with counsel in connection with their impending discovery

depositions, to include a discussion concerning the deceased's medical information, is GRANTED.[1]

DONE AND ORDERED in Chambers at Gainesville, Alachua County, Florida, on July 11, 2008.

/s/ Toby S. Monaco
TOBY S. MONACO,
Circuit Judge

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[1] The Court notes that the University of Florida Board of Trustees has joined in the motions with Doctors Beaver, Normann and Cardona. It does not, however, appear that any designated representative of UFBOT is being scheduled for deposition, and consequently UFBOT does not appear to have direct standing to raise any justiciable controversy at this point.

APPENDIX C

SUPREME COURT OF FLORIDA

THURSDAY, SEPTEMBER 24, 2009

CASE NO.: SC09-1006
Lower Tribunal No(s): 1D08-3923,
01-2007-CA-3643

UNIVERSITY OF FLORIDA BOARD OF TRUSTEEES, ET AL., PETITIONERS
vs.
PATRICIA DANNEMANN, ET AL., RESPONDENTS.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

QUINCE, C.J., and PARIENTE, LEWIS, CANADY, and POLSTON, JJ., concur.